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MOIR & HARDMAN

KENNETH E. HARDMAN

ATTORNEYS AT LAW
1828 L STREET, N.W., SUITE 901
WASHINGTON, D.C. 20036-5104
FACSIMILE: (202) 833-2416
kenhardman@attglobal.net

DIRECT DIAL: (202) 223-3772

July 21, 2000

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WRITTEN EX PARTE PRESENTATION

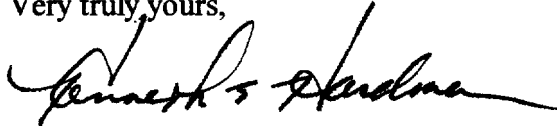
Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 - 12th Street, S.W., Room TW-A325
Washington, DC 20554

Re: Wireless Consumers Alliance, Inc.
Petition for Declaratory Ruling
File No. WT 99-263

Dear Ms. Salas:

Enclosed in duplicate are Attachments A, B and C to the written Ex Parte Comments of the Wireless Consumers Alliance, Inc., which were filed electronically earlier today. Kindly associate the Attachments in the docket with the filing in chief.

Very truly yours,



Kenneth E. Hardman

Enclosures

No. of Copies rec'd 071
List A B C D E

Attachment “A ”

NO. 1044

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHIRLEY H. KATZ, Plaintiff,
vs.
UNITED STATES AIR FORCE, Defendant.

Before the Court.

AIR WIRELESS SERVICES, INC.

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
The Honorable Charles E. Kohn, District Judge.

NO. 22, 10044

UNITED STATES AIR FORCE AIR WIRELESS SERVICES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.
The Honorable Charles E. Kohn, District Judge.
AIR WIRELESS SERVICES, INC.,
Defendant-Appellee,
vs.
SHIRLEY H. KATZ,
Plaintiff-Appellant.

Submitted for decision on appeal on May 1, 1964.
Affirmed on May 1, 1964.

UNITED STATES AIR FORCE AIR WIRELESS SERVICES, INC.

DISCLOSURE STATEMENT
(formerly known as Certificate of Interest)

Appellate Court No: 99-2127

Short Caption: BASTIEN v. AT&T WIRELESS SERVICES, INC.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement stating the following information in compliance with Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1. **NOTE: Counsel is required to complete the entire statement and to use N/A for any information that is not applicable.**

- (1) The full name of every party, any parent corporation, and any publicly held company that owns 10% or more of the party's stock that the attorney represents in the case:

N/A

- (2) If such party or amicus is a corporation:

- i) Its parent corporation, if any; and

AT&T Corp.

- ii) A list of stockholders which are publicly held companies owning 10% or more of the stock in the party or amicus:

N/A

- (3) The names of all law firms whose partners or associates have appeared for the party in the case or are expected to appear for the party in this court:

Robinson Curley & Clayton, P.C.

This disclosure statement shall be filed with the principal brief or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. The attorney furnishing the statement must file an amended statement to reflect any material changes in the required information. The text of the statement (i.e. caption omitted) shall also be included in front of the table of contents of the party's main brief.

Attorney's Signature: Fay Clayton

Date: 7-29-99

Attorney's Printed Name: Fay Clayton

Address: Robinson Curley & Clayton, P.C.

300 South Wacker Drive, Suite 1700

Chicago, Illinois 60606

Phone Number: (312) 663-3100

Fax Number: (312) 663-0303

E-Mail Address: RCCLAW@INIL.COM

[**5] (b); 47 U.S.C. § 201; Kennedy and Purcell, *Section 332 of the Communications Act of 1934: A Federal Regulatory Framework That Is "Hog Tight, Horse High, and Bull Strong"* (1998) 50 Federal Communications L.J. 547, 555-561 (hereafter, Kennedy and Purcell, *Section 332*, 50 Federal Communications L.J.). For example, the PUC had the power to review certain cellular rates that were filed with it in a tariff, under a "just and reasonable" standard. (See e.g., Pub. Util. Code, § 728.)

By enacting section 332(c)(3)(A) in 1993, Congress "dramatically revised the regulation of the wireless telecommunications industry, of which cellular telephone service is a part." (*Conn. Dept. of Public Utility Cont. v. F.C.C.* (2d Cir. 1996) 78 F.3d 842, 845; see Kennedy and Purcell, *Section 332*, 50 Federal Communications L.J. at pp. 555-565.) "To foster the growth and development of mobile services [i.e., cellular and related mobile wireless communications] that, by their nature, operate without regard to state lines as an integral part of the national telecommunications infrastructure, ¶new section 332(c)(3)(A) [**6] . . . preempts state rate and entry regulation of all commercial mobile services," but permits state regulation of "other terms and conditions." (H.R. Rep. No. 103-111, at p. 260, reprinted in 1993 U.S.C.C.A.N. 378, 587 (hereafter, H.R. Rep. No. 103-111, with page numbers from 1993 U.S.C.C.A.N.); § 332.) These "other terms and conditions," notes this House Report, include "such matters as customer billing information and practices and billing disputes and other consumer protection matters; facilities siting issues (e.g., zoning); transfers of control; the bundling of services and equipment; and the requirement that carriers make capacity available on a wholesale basis or such other matters as fall within a state's lawful authority." (H.R. Rep. No. 103-111, p. 588; see also *Tenore v. AT&T Wireless SVCS* (Wa. 1998) 962 P.2d 104, 111 [136 Wn.2d 322] (*Tenore*); *GTE Mobilnet of Ohio v. Johnson* (6th Cir. 1997) 111 F.3d 469, 477-478.)

The trial court sustained the defendants' demurrer without leave to amend "on the ground the Federal Communications Act [§ 332(c)(3)(A)] preempts all state regulatory authority over wireless service rates." [**7] n1

-----Footnotes-----

n1 All defendants joined in the demurrer filed by the Los Angeles Cellular Telephone Company. This demurrer was based solely on the ground of section 332(c)(3)(A) preemption. Los Angeles Cellular was not named as a defendant in the plaintiffs' fifth and sixth causes of action. The defendants named in those counts filed a separate demurrer that expressly adopted Los Angeles Cellular's arguments in support of its demurrer.

-----End Footnotes-----

DISCUSSION

1. Standard of Review

¶A general demurrer challenges only the legal sufficiency of the complaint, not the truth or the accuracy of its factual allegations or the [*535] plaintiff's ability to prove those allegations. (*Amarel v. Connell* (1988) 202 Cal. App. 3d 137, 140, 248 Cal. Rptr. 276.) When a demurrer is sustained without leave to amend, we determine whether there is a reasonable possibility that a cause of action can be stated: if it can be, we reverse; if not, we affirm. (*Blank v. Kirwan* (1985) 39 Cal. 3d 311, 318, 216 Cal. Rptr. 718, 703 P.2d 58.) [**8]

¶A demurrer is an appropriate vehicle to secure a dismissal of a state law [***805] action based on federal law preemption. (See *Smiley v. Citibank* (1995) 11 Cal. 4th 138, 164, 900 P.2d 690; *Sanderson, Thompson, Ratledge & Zimny v. AWACS* (D.Del. 1997) 958 F. Supp. 947, 957 (*Sanderson*).) ¶Federal law preemption is based on the Supremacy Clause of the federal Constitution, and may be demonstrated by the explicit language of a federal statute, by an actual conflict between state and federal law, or by a federal law exclusively occupying

the "legislative field." (U.S. Const., art VI, cl. 2; *Smiley, supra*, at p. 147; *Sanderson, supra*, at p. 957.) The preemption alleged here is based on the explicit language of section 332(c)(3)(A).

2. The Plaintiffs' Challenges to Paying for Non-Communication Time

The plaintiffs' complaint identifies five items of non-communication time that are billed in alleged violation of Business and Professions Code section 17200's prohibition on unfair or unlawful business practices. The five are:

--charging in full-minute billing increments (what the plaintiffs [****9**] call "rounding up"), in which a full minute of wireless service is charged for each part of a minute used (the first cause of action alleges this is an unfair business practice; the second cause of action alleges it is an unlawful business practice);

--charging from connection to disconnection (what the plaintiffs term the "send" to "end" measurement--pressing the send and end buttons starts and ends the charging; the third cause of action alleges this as an unfair business practice, the fourth cause of action as unlawful);

--charging for ringing time for completed calls, while not charging for ringing time for uncompleted calls (the fifth cause of action alleges this as an unfair business practice, the sixth cause of action as unlawful; this claim was not asserted against Los Angeles Cellular);

--charging full rates for "incomplete calls" in the Los Angeles area for "bucket plans" in violation of PUC-filed tariffs; a "bucket plan" gives a [***536**] customer a certain number of minutes of use per month; the seventh cause of action alleges this is an unlawful business practice);

--charging for the time it takes for the system to disconnect at the telephone company's [****10**] facilities after a conversation is concluded (what the plaintiffs term the "lag time"; the eighth cause of action alleges this as an unlawful business practice, the ninth cause of action as unfair).

In each of these causes of action, plaintiffs seek "restitution of all amounts overpaid by [them] and other members of the general public . . . as a result of the aforesaid unfair business act or practice." They also seek, in each cause of action, a permanent injunction enjoining defendants from engaging in any of these unfair or unlawful business practices.

The plaintiffs argue that these claims are subject to state law as mere "billing practices." The defendants counter that a state court, in adjudicating these claims, would have to regulate the "rates charged" by a cellular provider, something a state is explicitly prohibited from doing under section 332(c)(3)(A). =RB 10-25= The defendants have the better argument.

The court in *Comcast Cellular* faced an issue of "rates charged" very similar to the one before us, and we find its reasoning and decision on that issue persuasive.

In *Comcast Cellular*, the plaintiffs alleged that a cellular provider's practice of charging in [****11**] one-minute billing increments ("rounding-up") and charging for the non-communication period from the time a call is initiated until the call is answered violated the Pennsylvania Unfair Trade Practices and Consumer Protection Law as well as the implied covenant of good faith and fair dealing, and unjustly enriched the cellular provider, *Comcast*. (949 F. Supp. at p. 1196.) The plaintiffs in *Comcast* also alleged that Comcast inadequately disclosed [*****806**] these billing practices to its customers. (*Ibid.*)

The *Comcast Cellular* court concluded that the plaintiffs' claims of inadequate disclosure of these billing practices were subject to state law. (949 F. Supp. at pp. 1199-1200.) But the

plaintiffs' state law claims challenging the charges for non-communication time, including the rounding-up charge, were preempted by section 332(c)(3)(A), said the *Comcast Cellular* court, because they posed "clear challenges to the reasonableness of the rates charged by Comcast for cellular phone services." (*Id.* at p. 1200.)

The *Comcast Cellular* court reasoned as follows. The plaintiffs alleged that the non-communication charges violated the covenant [**12] of good faith and [*537] fair dealing and unjustly enriched Comcast. Thus, said the court, these allegations "directly" and "clearly" challenge "the reasonableness of the rates charged by Comcast" (949 F. Supp. at p. 1200.)

The remedies the *Comcast Cellular* plaintiffs sought also showed they were challenging Comcast's rates and not just the failure to disclose those rates. The court noted in this regard: "Recovery of the amounts collected by [Comcast] through its alleged unlawful practices can be justified on the basis of nondisclosure. The injunctions demanded by the Plaintiffs do not, however, mandate disclosure or simply seek to enjoin [Comcast's] practice pending full disclosure. Rather, the Plaintiffs are seeking to permanently prevent Comcast from charging for the non-communication period. The request for such an injunction is nothing less than a request that the court regulate the manner in which Comcast calculates its rates schedules." (949 F. Supp. at p. 1201.)

The *Comcast Cellular* court concluded: "[The Plaintiffs' claims] attack[] the reasonableness of the method by which Comcast calculates the length and, consequently, the [**13] cost of a cellular telephone call. As such, the Plaintiffs' claims present a direct challenge to the calculation of the rates charged by Comcast for cellular telephone service. The remedies they seek would require a state court to engage in regulation of the rates charged by a [cellular] provider, something [a state] is explicitly prohibited from doing [under section 332(c)(3) (A)]." (949 F. Supp. at p. 1201; see *Chicago & N. W. Tr. Co. v. Kalo Brick & Tile* (1981) 450 U.S. 311, 326 [67 L. Ed. 2d 258, 270-271, 101 S. Ct. 1124] ✎[state court adjudication is a form of state regulation].)

Comcast Cellular's reasoning, which we find persuasive, can be applied to the issue before us of charging for non-communication time.

The plaintiffs have alleged in their complaint that charging for non-communication time is an "unfair" and "unlawful" business practice under California's unfair business practices law. (Bus. & Prof. Code, § 17200 et seq.) As in *Comcast Cellular*, this allegation "presents a clear challenge to the reasonableness of the rates charged" by the defendants. (949 F. Supp. at p. 1200.) [**14]

The plaintiffs here, like the plaintiffs in *Comcast Cellular*, are seeking through their request for a permanent injunction "to permanently prevent [the defendants] from charging for the non-communication period." (949 F. Supp. at p. 1201.) This request "is nothing less than a request that [we] regulate the manner in which [the defendants] calculate[] [their] rate schedules." (*Ibid.*)

The plaintiffs' claims here, like the plaintiffs' claims in *Comcast Cellular*, attack the reasonableness of the method by which the defendants calculate [*538] the length and, consequently, the cost of a cellular phone call. As such, the plaintiffs' claims present a direct challenge to the rates charged by the defendants for cellular phone service. (949 F. Supp. at p. 1201.)

The plaintiffs beg to differ with this analysis. As they argue, the total charge for airtime on a wireless network is made [***807] up of a rate component multiplied by a time component. It is obvious, they maintain, that the time component of the airtime charged has absolutely nothing to do with the rate charged.

We beg to differ. As the defendants point out, this distinction between rate and time [**15] is nonsensical because the rate charged for wireless service includes both price and time. ¶ A rate for a service, like cellular phone service, that is sold based on the length of time that it is used necessarily includes a method of measuring that time, as well as a price for each unit of time used; in short, the length of time for which a customer is charged is an inseparable component of the rate. This accords with the pertinent definition of "rate": "The cost per unit of a commodity or service[;] A charge or payment *calculated in relation to a particular sum or quantity*" (The American Heritage Dictionary (2d College Ed. 1982), p. 1027, italics added.) As the United States Supreme Court has put it: ¶ "Rates . . . do not exist in isolation. They have meaning only when one knows the services to which they are attached." (*AT&T v. Central Office Telephone* (1998) 524 U.S. 214, 141 L. Ed. 2d 222, 233, 118 S. Ct. 1956.) In the context of cellular service, the element of time can no more be divorced from rate than a clock from its hands.

Based on this reasoning, the Federal Communications Commission (FCC) has recently concluded "that ¶ the term 'rates charged' [**16] in [section 332(c)(3)(A)] may include both rate levels and rate structures for [cellular providers] and that the states are precluded from regulating either of these." (*In re Southwestern Bell Mobile Systems, Inc.* F.C.C. 99-356 (November 24, 1999), P 20.) The FCC has also stated that ¶ billing increments are a necessary component of the rates charged by cellular providers, and that under section 332(c)(3)(A) "states do not have authority to prohibit [cellular providers] from . . . charging in whole minute increments." (*In re Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993* (1995) 10 FCC Rcd 8844, P 70 (First Report); *In re MCI Cellular Telephone Co.* (1984) 96 F.C.C.2d 1015, 1033, PP 49-51; *In re Southwestern Bell Mobile Systems, Inc.*, *supra*, F.C.C. 99-356, P 23.) Finally, ¶ the FCC has interpreted the "rates charged by" language in section 332(c)(3)(A) to "prohibit states from prescribing, setting or fixing rates" of cellular providers. (*In re Pittencrieff Communications, Inc.* (1997) 13 FCC Rcd 1735, 1745, P 20; see *Cellular Telecommunications Industry v. F.C.C.* (D.C.Cir. 1999) 335 U.S. App. D.C. 32, 168 F.3d 1332, 1336.) [**17] If states could regulate as envisioned by the plaintiffs here, those states would, at the least, be prescribing rates.

[*539] The plaintiffs' challenges here to charges for non-communication time are more directly related to "the rates charged" than the challenges found preempted under section 332(c)(3)(A) in a recent decision, *Bastien v. AT&T Wireless Services, Inc.* (7th Cir. 2000) 205 F.3d 983. In *Bastien*, the plaintiff sued a new cellular provider in state court for breach of contract and consumer fraud because a high number of his calls were cut-off. (205 F.3d at p. 985.) The plaintiff basically alleged that the new cellular provider "'signed up subscribers without first building the cellular towers and other infrastructure necessary to provide reliable cellular connections.'" (*Id.* at p. 989.) The *Bastien* court deemed the plaintiff's suit preempted by section 332(c)(3)(A) because it encompassed "the entry of [and] the rates charged by" the cellular provider. (*Id.* at pp. 984, 989.) As for "the rates charged" preemption, *Bastien* reasoned that "a complaint that service quality is poor is really an attack on the [**18] rates charged for the service and may be treated as a federal case regardless of whether the issue was framed in terms of state law." (*Id.* at p. 988.)

This case is not akin to those decisions that have found certain cellular or related [***808] communication charges still subject to state law. (See e.g., *Esquivel v. Southwestern Bell Mobile Systems, Inc.* (S.D.Tex. 1996) 920 F. Supp. 713 [finding a charge for early termination of cellular service to be a "term and condition" of service, not a rate, and therefore subject to state regulation]; *Co. of Ky., ex rel. Gorman v. Comcast Cable* (W.D.Ky. 1995) 881 F. Supp. 285 [finding the practice of billing customers for certain services unless they specifically decline them is still subject to state regulation]; *Cellular Telecommunications Industry v. F.C.C.*, *supra*, 168 F.3d 1332 and *Mountain Solutions v. State Corp. Com'n of Kansas* (D.Kan. 1997) 966 F. Supp. 1043 [state laws requiring cellular providers to contribute money to state-run universal service programs not preempted by section 332(c)(3)(A)].) The billing practices in these cases have only a tangential [**19] relationship to the actual rates for service paid by cellular customers. (See *Comcast Cellular*, *supra*, 949 F. Supp. at p.

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JURISDICTIONAL STATEMENT

The jurisdictional summary in the Appellant's Brief is correct but not complete.

1. The basis for subject matter jurisdiction is the Communications Act of 1934, 47 U.S.C. § 151, *et seq.*, as amended.

2. Bastien invokes this Court's jurisdiction over final judgments under 28 U.S.C. § 1291.

(i) In an order dated April 20, 1999, Judge Kocoras dismissed the entire Complaint for failing to state claims upon which relief could be granted, and denied Bastien's motion to remand as moot.

(ii) No motions for new trial or alteration of judgement were filed.

(iii) Bastien filed his notice of appeal on May 6, 1999.

(iv) On June 10, 1999, this Court granted Bastien's motion for an extension of time, and ordered him to file his opening brief by June 30, 1999, ordered AT&T Wireless to file its response brief by July 30, 1999, and ordered Bastien to file his reply, if any, by August 13, 1999.

ISSUE

Is a complaint exclusively federal and therefore removable under 28 U.S.C. § 1441(b) because it challenges AT&T Wireless's rates and its entry into the wireless market, matters that are completely regulated and preempted by the Federal Communications Act of 1934, 47 U.S.C. § 332(c)(3)(A)?

STATEMENT OF THE CASE

Nature of the Case

The Complaint in this case, initially filed in state court, challenged the timing of AT&T Wireless's entry into the Chicago market and the rates Bastien was charged for "dropped" calls. (R.1, Ex. 1) Although fashioned as state-law contract and consumer-fraud claims, the actual language of the Complaint depended upon Bastien's repeated allegation that AT&T Wireless "sign[ed] up wireless telephone subscribers *without first building the cellular towers and other infrastructure* necessary to provide reliable cellular service to such subscribers" (R.1., Ex. 1, at ¶ 1; *see also id.* at ¶¶ 9, 19b, 23, 25a, 26) The Complaint asserted that AT&T Wireless's allegedly inadequate infrastructure caused Bastien to experience "dropped" calls, for which he did not receive adequate compensation or rebates. (*Id.* at ¶¶ 9-10, 15-16, 23, 25a, 25d, 26)

The Federal Communications Act of 1934, Pub. L. 103-66, 107 Stat. 31, 392, as amended by the Omnibus Budget Reconciliation Act of 1993, Pub. L. 103-66, 107 Stat. 31, 392 (the Communications Act" or the "Act"), prohibits state regulation of entry by, or rates of, wireless service providers. The Act preempts all state authority in these areas. Because the Complaint attacked AT&T Wireless's right to enter the market with its then existing level of infrastructure, and because it challenged the reasonableness of AT&T Wireless's rates and rebates for "dropped" calls, AT&T Wireless removed the case to federal court based on the express preemption provision of Section 332. (R.1) By order dated April 20, 1999, the district court dismissed the Complaint on preemption grounds in light of the Plaintiff's explicit decision not to proceed on any potential federal claim. (R.14) This appeal followed.

Statement of the Facts

Bastien has conceded that AT&T Wireless began to offer wireless telephone service in Chicago only after fully complying with the Federal Communication Commission's (the "FCC" or the "Commission") regulations for wireless providers. (*See* Appellant Br. at 8) It is undisputed that AT&T Wireless has complied with all FCC regulations since it entered this market. (Appellant Br. at 8) These FCC regulations concern almost every facet of wireless communication, including infrastructure and both geographic area and population percentage coverage (collectively "coverage") requirements. (*E.g.*, R.7 at 6, citing 47 C.F.R. Part 24) AT&T Wireless is a relatively recent entrant into the wireless telephone market in the Chicago area. (R. 14 at 2) Before its entry, the Chicago market was dominated by Ameritech and Southwestern Bell (Cellular One). (*Id.*; R.1, Ex. 1, at ¶ 7)

Among the detailed requirements that must be met before the FCC permits entry into a wireless market is the coverage that a licensee must attain within a certain time frame. Within five years of initial operation, PCS licensees² must construct base stations that provide wireless service over a certain number of square kilometers or to a certain percentage of the population. (R.14 at 10, citing 47 C.F.R. §§ 24.103 and 24.203) Within ten years, the coverage requirements increase for both the geographic area and population percentage. (*Id.*) At the same time that the FCC requires PCS licensees like AT&T Wireless to meet these population and geographic coverage regulations, because of concerns for radio-frequency exposure risk and radio interference, the FCC specifically limits both the

² "Personal Communications Service," or "PCS," is a form of wireless service that involves "[r]adio communications that encompass mobile and ancillary fixed communications that provide services to individuals and businesses and can be integrated with a variety of competing networks." 47 C.F.R. § 24.5. In the Chicago area, AT&T Wireless provides "Broadband PCS," which is PCS service that operates in the 1850-1910 MHz and 1930-1990

power that antennae can emit (R.7 at 7) and the number of towers that can be erected. (*Id.*, citing 9 F.C.C.R. 4957, 4967 (June 9, 1994))

To promote competition, the FCC encourages rapid market entry into the wireless market *before* a licensee can provide *complete* coverage. (*Id.*, citing 9 F.C.C.R. at 4960) The FCC has determined that early competition benefits consumers by affording both price competition and service choices. (*Id.*) This regulatory framework was established, after weighing conflicting arguments, to foster rapid creation of a competitive market and to deliver these new mobile digital voice and data services to the American public promptly, at low cost, with the inevitable corollary that the service provided by a wireless licensee may be less than perfect. (*Id.*)

Wireless service depends upon the transmission of radio waves, which are subject to conditions and interference that inevitably cause "dropped" calls.³ AT&T Wireless has established two ways by which its customers may obtain a credit for "dropped" calls. First, customers who are unable to complete a call can contact an AT&T Wireless "customer care"

³ The FCC has long recognized the inherent limitations in wireless services because, as a radio wave, it is subject first to the laws of physics. (R.13 at 10 n.8, citing *In re Amendment of Parts 21, 43, 74, 78, and 94 of the Commission's Rules Governing Use of Frequencies in the 2.1 and 2.5 GHz Bands*, 5 F.C.C.R. 6410, at ¶ 78 (October 26, 1990) ("... Occasionally, small portions of a station's service area may be precluded from reception by the shadowing effects of tall buildings, bridges, ground depressions, or other obstructions."); *In re Amendments of Sections of Part 22 of the Commission's Rules Airborne Use of Cellular Units and the Use of Cell Enhancers in the Domestic Public Cellular Radio Service*, 3 F.C.C.R. 5265, at ¶ 6 (September 2, 1998) ("Many licensees in the Domestic Public Cellular Radio Service, as a result of unforeseen *terrain* or shadowing, experience areas of poor or non-existent cellular service within their Cellular Geographic Service Area."); see also *Interactive Video Data Service (IVDS) Licenses*, 11 F.C.C.R. 12994, at ¶ 7 (October 4, 1996) ("In addition, we note that licensing of any new service includes inherent uncertainties about the development of the service. In this connection, . . . gaps in service area coverage. . . . even if unexpected, . . ." are not grounds for amending a licensee's payment obligations to the FCC).) See also H.R. 103-111 at 247 ("Radio waves . . . behave differently at different frequencies, particularly in the way they are affected by terrain and . . .")

representative to obtain a billing credit. (R.12, Ex. C) AT&T Wireless's customer care representatives are available twenty-four hours a day, seven days a week. (*Id.*) In the alternative, if the customer is able successfully to redial the "dropped" number within sixty seconds, AT&T Wireless's billing system automatically credits the customer's account for one full minute of air-time, without any customer effort at all. (*Id.*; R.1, Ex. 1, at ¶ 15)

Bastien signed up for wireless service with AT&T Wireless in August 1998. (R.1, Ex. 1 at ¶ 13) His Responsive Brief in the court below conceded that AT&T Wireless's entry into the market made a "choice between competitors" possible. (R.12 at 4-5) Although he continued to retain AT&T Wireless as his PCS carrier, in November 1998, he complained to the FCC about the same situation on which his Complaint is based. (R.12, Ex. C) In response to his complaint, the Commission explained that AT&T Wireless was in full compliance with FCC rules, *id.* (Bastien concedes this, too. *See* Appellant Br. at 8) The Commission reminded Bastien of the two crediting procedures that AT&T Wireless has for "dropped" calls, and noted that Bastien had availed himself of AT&T Wireless's credit procedures. (R.12, Ex. C) (The Complaint itself does not acknowledge that Mr. Bastien was aware of the availability of an alternative remedy to the "automatic credit" for redialed calls, but the appendix to his brief below reveals that Bastien received at least \$350 in credits to his account within the first three months of initiating his service with AT&T Wireless. (R.12, Ex. C))

On appeal, Bastien attempts to recast his Complaint as one for breached "contractual obligations,"⁴ "contractual commitments"⁵ or "contractual undertakings"⁶ that somehow

⁴ *See* Appellant Br. at 5, 19.

guaranteed that he would always be able to redial a "dropped" call within sixty seconds, but the Complaint does not make that allegation. (*See, generally*, R.1, Ex. 1) The actual language of the Complaint identifies no promise, misrepresentation or omission that AT&T Wireless allegedly made. Instead, the Complaint focuses exclusively on AT&T Wireless's entry into the market while its infrastructure was allegedly inadequate (R.1, Ex. 1 at ¶¶ 1, 9, 19b, 23, 25a, 26), and the charges or rebates for "dropped" calls. It also includes an extensive discussion of a lawsuit brought by AT&T Wireless against the Village of Bloomingdale, seeking an injunction to allow AT&T Wireless to build a tower in that village in order to continue to meet the coverage requirements of its FCC license. (R.1, Ex. 1 at ¶ 12 and Ex. B)

The District Court Order

By Memorandum Opinion dated April 20, 1999, the district court dismissed Bastien's Complaint under Rule 12(b)(6). (R.14) The court held that if Bastien questioned AT&T Wireless's right to enter the Chicago market due to insufficient infrastructure, his claims were necessarily preempted by the Federal Communications Act of 1934. (*Id.* at 5)

While noting that claims challenging certain "other terms and conditions" of wireless service could exist outside the preemption clause, the court concluded that the broad statements contained in Bastien's Complaint challenged AT&T Wireless's "right to enter the Chicago market." (*Id.* at 7) In reaching that conclusion, the court relied on this Court's opinion in *Cahnmann v. Sprint Corp.*, 133 F.3d 484 (7th Cir. 1998), which refused to adopt a construction of the Act's saving clause that would "effectively nullify the [] provisions" of the Communications Act. (R.14 at 9) After examining the applicable regulations in the field

⁶ See Appellant Br. at 3, 5, 17-18 n.6, 22, 24.

of wireless communications, the district court explained that entry into the wireless market is "highly regulated" (*Id.* at 10), including build-out and coverage requirements, the percentage of the population that a licensee must reach within a specified period of time, and the power that antennae may emit. (*Id.* at 10, citing 47 C.F.R. §§ 24.103, 24.203, 24.55) A lawsuit that questions, directly or indirectly, the right to enter the wireless market is preempted. (R.14 at 10-11) Comparing this case with *Cahnmann*, the district court found that this case presented a heightened reason for applying the preemption rule because here, unlike *Cahnmann*, the Communications Act "is *explicit* in preempting state regulation of market entry." (R.14 at 10) The court concluded, "[t]he preemption clause . . . essentially extinguish[es] all state causes of action that question directly or indirectly the right to enter the market." (R.14 at 10-11) The court rejected Bastien's argument that his Complaint did not question AT&T Wireless's market entry and observed:

While Bastien strenuously denies that he questions AT&T Wireless's market entry, *he does just that*. It would require an incredible stretch of the English language to interpret [the contract] count to mean anything but a challenge to AT&T Wireless's ability to enter the Chicago market.

(*Id.* at 11) Because claims to entry into the wireless market can "only arise under federal law, for federal law has extinguished the state law basis under which it might otherwise arise," the court found Bastien's Complaint preempted. (*Id.* at 11-12, citing *Cahnmann* at 490)

Turning to Bastien's consumer-fraud claim, the court found that this claim also hinged on AT&T Wireless's alleged lack of capacity to handle calls or to give rebates for "dropped" calls. Therefore, it too challenged AT&T Wireless's market entry — an area completely preempted under Section 332. (R.14 at 12-13)

Because Bastien wanted his claim to "stand or fall" on state law and not federal claims, the district court dismissed his Complaint without addressing the issue of whether, had he stated any federal claims, they should have been sent to the FCC under the doctrine of primary jurisdiction. (*Id.* at 12, 13)

SUMMARY OF ARGUMENT

The district court properly held that the Complaint Bastien actually pled was exclusively federal in substance because it challenged AT&T Wireless's right to enter the Chicago market and its rates. Both of these matters are subject to express preemption under the Communications Act. Therefore, the district court held that although Bastien had artfully cast the Complaint in terms of state-law claims, it had to be seen as federal in nature and therefore removable under 28 U.S.C. § 1441(b).

Bastien challenged AT&T Wireless's provision of services "without first building the cellular towers and other infrastructure" Bastien deemed adequate. Bastien's Complaint also demands rebates for "dropped" calls in the form of additional calls or damages. Although he claims that AT&T was required to make available a specific type of redialed call, the Supreme Court has established that claims couched as demands for preferential or different service or damages are, in effect, challenges to rates, and where rate regulation is preempted, so are such claims. *See American Telephone & Telegraph Co. v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1963 (1998). Indeed, *Central Office Telephone* and this Court's decision in *Calmann* are, as the district court held, dispositive and support AT&T's right to removal. Section 332 of the Communications Act makes clear that the state may *not* regulate rates and entry.

Bastien's Complaint challenges the reasonableness of AT&T Wireless's infrastructure, rates and rebates that might have been sent to the FCC under the doctrine of primary jurisdiction. However, Bastien made clear to the district court that he chose to have his claim stand or fall as a state-law claim, and would not prosecute a federal claim even if one arose from the facts as alleged. Therefore, the district court properly dismissed the case rather than referring the matter to the FCC.

ARGUMENT

I. Standard of Review

Bastien states that the relevant standard of review is provided by Rule 12(b)(6). Because he only challenges the jurisdiction of this Court, the proper standard is supplied by Rule 12(b)(1). Both standards require *de novo* review. See, e.g., *Pelt v. Utah*, 104 F.3d 1534, 1540 (10th Cir. 1996).

II. Removal Was Proper Because Bastien's Claims Are Completely Preempted by the Federal Communications Act.

A. Claims That Attempt to Regulate Either Entry Into the Wireless Market or Wireless Telephone Rates Are Expressly Preempted by the Act.

When Congress has completely preempted a particular area of law, a complaint raising a claim within that area is necessarily federal in character and removable to federal court under 28 U.S.C. § 1441(b). See *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63-64 (1987). The artful attempt to articulate a claim as a state-law claim is irrelevant. As the Supreme Court explained in *Metropolitan Life*, any claim that Congress has reserved for exclusive federal regulation is, of necessity, "purely a creature of federal law. notwithstanding the fact that state law would provide a cause of action in the absence of [the

statute that creates an exclusively federal remedy]." 481 U.S. at 63-64 (*citing Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 23 (1983)). "Preemption [] wipes out the state law." *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1075 (7th Cir. 1992). Therefore, if the claim treads on a completely preempted area, the court will "recharacterize" it as a federal claim. *Metropolitan Life*, 481 U.S. at 63-64. This is true regardless of the label that the author of the complaint attaches to it, and regardless of any "crafty drafting" by which the plaintiff tries to defeat the statutory right to remove. *Bartholet*, 953 F.2d at 1075.

Judge Kocoras properly held that Section 332(c)(3) of the Communications Act creates an area of exclusive federal regulation that required the recasting of Bastien's Complaint as a federal claim. Because the Complaint was necessarily federal, it was removable. (R.14 at 10-11)

The right to enter a wireless market is expressly and completely preempted by Section 332(c)(3)(A) of the Act. Section 332 is entitled, "State Preemption," and it provides that "[n]o State or Local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service or any private mobile service" 47 U.S.C. § 332(c)(3)(A). This language explicitly declares that Congress has completely occupied the areas of law concerned with the rates and entry of wireless service providers.

Bastien himself seems to recognize that Congress displaced the claims stated in his Complaint because he makes every effort to avoid what he actually pled. On appeal Bastien attempts to recast his claim, pretending that it alleged AT&T Wireless promised that customers could *always* successfully redial within sixty seconds. *E.g.*, Appellant Br. at 3, 5, 17 n.6, 24. But this assertion has no grounding in either the words of his Complaint or in

fact. The Complaint *did* make reference to the availability of a refund for "dropped" calls, but it did not plead — nor could it, consistent with Rule 11, Fed. R. Civ. P. (or the Illinois state law equivalent) — that AT&T Wireless "promised" that calls could always be immediately redialed.⁷ Instead, he challenged AT&T Wireless's provision of service "without first building more towers and other infrastructure," which the district court correctly held can *only* be a federal claim.

Examining Bastien's claim, the court concluded that despite Bastien's vehement denials, the statements he made in his Complaint *on their face* challenged AT&T Wireless's right to enter the Chicago market. (R.14 at 6-7) Indeed, not just once, but six (6) times in his 27-paragraph Complaint, Bastien charges that AT&T Wireless committed an actionable wrong when it entered the market ("signed up subscribers") while its infrastructure was, in Bastien's opinion, inadequate. *See* R.1, Ex. 1 at ¶ 1 ("[AT&T Wireless] sign[ed] up wireless telephone subscribers *without first building the cellular towers and other infrastructure* necessary to provide reliable cellular service to such subscribers . . ."); ¶ 9 ("AT&T Wireless signed up subscribers *without first building the cellular towers and other infrastructure* necessary to provide reliable cellular connections."); ¶ 19b ("AT&T Wireless signed up subscribers *without first building the cellular towers and other infrastructure* necessary to accommodate good cellular connections to such subscribers."); ¶ 23 ("By signing up subscribers *without first building the cellular towers and other infrastructure* necessary to accommodate good cellular connections to such subscribers . .

⁷ . . . Not only did the Complaint allege claims that can only be read to deal with rates and entry, but it never asserted a claim that could fairly be interpreted in the way Bastien asserts on appeal. The Complaint never identifies any "contract," far less any "guarantee" that customers could always successfully redial within sixty seconds: in fact, ¶ 15 of the Complaint suggests the opposite, conceding that Bastien knew "automatic credit" was

.."); ¶ 25a ("[alleging AT&T Wireless violated the Consumer Fraud Act by] signing up subscribers *without first building the cellular towers and other infrastructure* necessary to accommodate good cellular communications to such subscribers . . ."); and ¶ 26 ("AT&T Wireless knew that it was signing up subscribers *without first building the cellular towers and other infrastructure* necessary to handle the call range reasonably expected to be used by such subscribers . . .") Yet, despite all his attacks on AT&T Wireless's level of infrastructure, his Complaint never mentioned the alleged promise that his Appellant Brief discusses repeatedly. The district court properly held that the Complaint was removable to federal court. *See* 28 U.S.C. § 1441(b).

Bastien's entire appeal rests upon the "well-pleaded complaint" rule. However, as this Court has recently recognized, the substantive reality of preemption may trump that pleading rule when no state-law claim can arise from the allegations that are pled. In *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 490 (7th Cir. 1998), this Court held that removal was proper (and dismissal, too) for a purported state-law claim that challenged conduct regulated by the Communications Act. The Court held that under the artful pleading⁸ doctrine,

[i]f a claim can only arise under federal law, because federal law has extinguished the state law basis under which it might otherwise arise, the case is removable to federal court even if the plaintiff sedulously avoids mention of federal law in his complaint.

Cahnmann, 133 F.3d at 490. Like Bastien, Cahnmann purported to bring state-law claims for breach of contract and fraud. But the Communications Act extinguished these claims; it did not just provide a defense to state-law claims, but "occupie[d] the whole field, displacing state law." 133 F.3d at 488-89. Because the only claim that could be brought in this area

⁸ *Bartholet* referred to this as "crafty drafting." 953 F.3d at 1075.